BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and	)	MM Docket No. 92-259
Competition Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

THE GOOD

THE BAD

AND THE UGLY

or

REPLY COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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SUMMARY

Despite the absolute clarity of the law and the Commission's mandate from Congress, cable interests have sought retain discretion, create loopholes, and otherwise dull Congress's incisive solution to their anticompetitive tendencies.

> To all these proposals, the answer is simple and straightforward:
>
> The Committee...anticipates that the FCC will undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise.

INTV has classified many of these proposals as bad or ugly and combined with the good, so as to show

> the good,
>
> ..... the bad ,
>
> ..... and the ugly

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At the risk of appearing dyslogistic, INTV must suggest that the cable industry, having been drubbed decisively in Congress, now like one S. Hussein of Middle Eastern notoriety, appears intent on testing the Commission's resolve to implement the signal carriage provisions of the Cable Act in the fashion intended by Congress. 1 The following reply comments , consequently, must be submitted:

CHANNEL POSITIONING

THE GOOD

[1]INTV's fear of reprisal is mitigated by the fact that INTV's and TCI's offices soon will be co-located in the same building (albeit on different, if adjacent floors...of course.)

- **CABLE SYSTEMS SHOULD HAVE NO DISCRETION IN SELECTING A CHANNEL POSITION FOR A STATION ELECTING MUST CARRY ON THE SYSTEM.**

This is the whole point of the new law. Cable operators' discretion is subject to anticompetitive incentives; therefore, regulation must supplant that discretion. As Congress found:

> A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.[2]

In a similar vein, Congress also declared:

> The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems.[3]

Broadcast stations, as prime examples of "noncable-affiliated programmers," also confront and often have been confounded by cable operators' "incentive and ability to favor their affiliated programmers."[4] Therefore, Congress withdrew from cable

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[2]Cable Television Consumer Protection and Competition Act of 1992. Pub. L. No. 102-385, 102 Stat. ___ (1992), §2(a)(15) [hereinafter cited as the "Act"]. The primary provisions of the Act before the Commission in this proceeding are §§4, 5, and 6, which will be codified as §§614, 615, and 325(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§151 *et seq.* INTV will refer to these sections in their codified form.

[3]*Id.*, §2(a)(5).

[4]*See* Comments of INTV, MM Docket No. 90-4 (filed September 25, 1991).

operators the discretion to decide on which channel a local broadcast station would be carried.[5]

No ambiguity in the statute leaves any room for doubt or mischievous interpretation. Congress intended to place channel position decisions in the hands of the stations carried and effectuated its intent explicitly in the law. Section 614 (b)(6) states:

> *Each signal* carried in fulfillment of the carriage obligations of a cable operator under this section *shall be carried* on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19,1985, or on the channel on which it was carried on January 1, 1992, *at the election of the station,* or on such other channel number as is *mutually agreed upon by the station* and the cable operator. *Any dispute* regarding the positioning of a local commercial television station *shall be resolved by the Commission.*[6]

This fully effectuates Congress' intent, as expressed in the Conference Report (at 31 and 38) [emphasis supplied]:

> *Subsection (b)(6) governs* the cable system channel position on which signals carried pursuant to this section *must* be placed.

No mention is made anywhere of reserving any residual discretion to cable operators, regardless of circumstances.

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[5] The legislative history explains:

> Finally, the channel positioning requirement responds to the government interest in promoting strong competition between local television stations and cable systems. Unless local stations are guaranteed channel stability, cable systems have the incentive to reposition their signals, which compete with the cable cable systems for viewers and advertising, to channels which are less desirable and which viewers may have a hard time locating.

H.R. Rep. No. 102-628, 102d Cong., 2d Sess., at 66 [hereinafter cited as "House Report"].

[6] §614(b)(6) [emphasis supplied].

The Commission, therefore, enjoys no prerogative to reintroduce cable operator discretion into its rules implementing Section 614(b(6) or to sidestep its obligation to resolve disputes concerning channel position.

THE BAD

- **CABLE SYSTEMS MAY CARRY MUST CARRY SIGNALS ON THEIR BASIC TIER, REGARDLESS OF THE STATION'S ELECTION, IF THE SYSTEM'S BASIC TIER FAILS TO ENCOMPASS THE CHANNEL ELECTED BY THE STATION[7].**

INTV already has debunked this superficially appealing proposition.[8] Creating such a loophole in the rules would invite frustration of the new law's intended effect. Cable systems would be permitted to undo the channel position requirement by placing their basic tiers in a channel "Siberia" and then insisting that stations must be carried there.[9]

Furthermore, nothing in the law remotely suggests that Congress intended the requirement that local television stations be carried in the basic tier subvert the operation of the channel position requirement. Congress easily could have specified that the channel position requirements were subject to the basic tier carriage requirement, but chose not do so. Therefore, the Commission has no discretion under the Act to read such a qualification into the channel position requirement.

Finally, in the case of systems which face genuine technical problems in complying with a broadcaster's channel selection due to the channel range of its basic

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[7]Comments of Telecommunications, Inc., MM Docket No. 92-259 (filed January 4, 1992) at 23 [hereinafter cited as "TCI"]

[8]Comments of INTV, MM Docket No. 92-259 (filed January 4, 1992) at 16-17 [hereinafter cited as "INTV"]; *see also* Comments of the National Association of Broadcasters, MM Docket No. 92-259 (filed January 4, 1992) at 28 [hereinafter cited as "NAB"].

[9]Again, the age of the channel 2-13 basic tier has faded into history.

tier, a waiver or special relief may be sought if another mutually agreeable channel cannot be found. No general loophole, however, is either necessary or appropriate.

- **CABLE SYSTEMS SHOULD BE PERMITTED TO DISREGARD BROADCAST STATIONS' CHANNEL ELECTIONS IF CARRIAGE ON THE SELECTED CHANNEL WOULD RESULT IN SIGNAL SECURITY OR OTHER TECHNICAL PROBLEMS.**[10]

INTV well understands that cable systems may find it inconvenient to rearrange channel assignments and that in a few cases genuine technical obstacles may exist to immediate compliance with a station's channel position designation. In no way does this justify according cable operators *carte blanche* to disregard broadcasters' channel position selections via a generally applicable "inconvenience or technical infeasibility" loophole in the rules.

Again, this is the stuff of waivers and special relief in cases where negotiation between the system and the station fail to produce agreement on an alternate channel position. Legitimate channel assignment problems can be expected to produce agreements for alternate channel assignments. For example, stations insisting on carriage on a channel which would offer subscribers an interference-plagued signal hardly is likely. Only if a station were unreasonably intransigent or a cable system hiding behind a trumped up "technical problem" would the Commission have to assume the responsibility placed squarely on it by Congress and resolve the dispute.[11]

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[10]Comments of Continental Cablevision, Inc., MM Docket No. 92-259 (filed January 4, 1992) at 15 [hereinafter cited as "Continental"].

[11]INTV would like to think that the days of "lightening struck our switcher (for the eighth time this month)" are long gone.

.....AND THE UGLY

- **CABLE SYSTEM FRANCHISE AGREEMENTS OR OTHER CONTRACTS WITH NETWORK OR PROGRAM SERVICES WHICH SPECIFY CHANNEL POSITION OUGHT TAKE PRECEDENCE OVER A BROADCAST TELEVISION STATION'S CHANNEL SELECTION.**[12]

Someone is missing the point, again, here! Federal signal carriage requirements pre-empt local franchise requirements. This is nothing new.[13] Otherwise, the same cable operators who now wish to hide behind the shield of their local franchises could not have used federal preemption as a shield against locally-imposed must carry requirements. Now cable operators would prefer to have local authorities specify signal carriage requirements and limits. NOT!

Furthermore, putting aside that federal law *just might* take precedence over private contracts,[14] the whole point of this law was to take precedence over channel position arrangements which ensconced cable networks on preferred channels at the expense of the competitive vitality of broadcast stations.[15] Permitting contracts with cable networks to supersede the channel positioning request of a station would subvert the law.

Such an interpretation also would come at the expense of stability. As contracts expired, stations would be shifted in accord with their pending channel position requests. This would extend any disruptive effect of implementing the new law. Congress chose a three year period of basic stability in signal carriage by

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[12]Comments of Viacom International, Inc., MM Docket No. 92-259 (filed January 4, 1992) at 7 [hereinafter cited as "Viacom"].

[13]*Cable Television Report and Order,* 36 FCC 2d 141 (1972).

[14]Facetiousness supplied.

[15]*See above.*

requiring stations to elect between must carry and retransmission consent every three years. Moreover, Congress could have grandfathered existing contracts, but elected otherwise. The Commission may not second-guess Congress in that regard.

Cable operator arguments that Section 614(b)(6) is a retroactive law are plainly incorrect. No action or agreement by a cable system in the past is suddenly declared illegal retroactively. The law is directed only at future actions.[16]Congress, therefore, had no obligation to expressly apply the channel positioning requirement retroactively in order to have it apply to pre-existing agreements.

Cable interests, therefore, provide no valid legal or practical basis for subjecting the new channel position requirements to franchise agreements or contracts with cable networks.

- **CABLE OPERATORS SHOULD HAVE FULL DISCRETION TO ESTABLISH PRIORITIES OR OTHERWISE TO RESOLVE CONFLICTING CLAIMS TO THE SAME CHANNEL POSITION BY BROADCAST TELEVISION STATIONS ELECTING MUST CARRY.**

  Read Congress's lips:

  > Any dispute regarding the positioning of a local commercial television station shall be resolved by the Commission.[17]

That is, suffice it to say, "resolved by the Commission." By whom, did they say? All together now, "BY THE COMMISSION!"[18] Got it?

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[16]For example, if Congress enacted a limitation on the amount of time a station could devote to commercial time after May 1, 1993, pre-existing advertising contracts would be subject to the limits in the absence of a specific grandfathering provision.

[17]§614(b)(6).

[18]Those curious about the reason for this explicit and unambiguous directive from Congress may wish to revisit the "GOOD" part of this section. *See also* §27 of the Act.

- NONCOMMERCIAL STATIONS SHOULD HAVE PRIORITY IF CONFLICTS ARISE BETWEEN STATIONS ENTITLED TO CARRIAGE ON THE SAME CHANNEL POSITION.[19]

No! Independent stations should have priority!

Now having stated an equally graceless and grasping position (with tongue in cheek),[20] INTV respectfully restates its general proposition that the Commission eschew pre-judging channel positioning conflicts by adopting a set of rigid, pre-set priorities.[21] Those few remaining conflicts which defy a negotiated resolution will pose no significant burden to the Commission and escape arbitrary resolution insensitive to the facts of the case at hand.

Therefore, no preference for noncommercial stations is remotely necessary or desirable.

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[19]Comments of the Consumer Federation of America and Media Access Project, MM Docket No. 92-259 (filed January 4, 1992) at 14.

[20]INTV notes in fairness that this proposition emanated not from public broadcasting interests,but from elsewhere.

[21]The arguments against such priorities are set forth in INTV's Comments (at 15-16).

SUBSTANTIAL DUPLICATION / NETWORK DEFINITION

THE GOOD

- **THE DEFINITION OF SUBSTANTIAL DUPLICATION MUST EMBRACE THE CONCEPT OF MORE THAN 50% SIMULTANEOUS DUPLICATION OF PROGRAMMING.**

Cable systems are relieved of the obligation to carry "the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system...."[22] The House Report explains what Congress intended in terms of the definition of substantial duplication:

> The term "substantially duplicates" is intended to refer to the *simultaneous* transmission of identical programming on two stations which are each eligible to assert signal carriage protection under this section, and which constitutes a *majority* of the programming of each station.[23]

The Commission, therefore, must adopt a definition which embraces the concepts of *simultaneous* duplication and a *majority* of the programming of *each* station.

..... THE BAD

- **THE DEFINITION OF SUBSTANTIAL DUPLICATION MUST LOOK ONLY TO PRIME TIME.**

Several parties have proposed a definition looking only to prime time program duplication. Such a constricted definition is uncalled-for and myopic. Nothing in the Act or its legislative history suggests such a narrow focus for the

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[22]§614(b)(5).

[23]House Report at 94. The House Report is authoritative with respect to this section because the conferees adopted the House bill's version of §614(b)(5). Conf. Rep. at 42.

definition. Whereas the Commission may have leeway to use a prime time test as one element of the definition or to exclude late night hours without diverging materially from Congressional intent, limiting the focus of the definition to prime time would involve too great a stretch.

Again, the House Report expressly states that duplication derives from "the majority of the programming on each station."[24]Prime time is a four hour period each day, constituting less than 20% of a 24-hour day. Whereas the number of households using television (the "HUT" level) is highest in prime time, it hardly is insignificant in other dayparts. For example, the HUT levels in Washington during various typical dayparts in February, 1992, were as follows:[25]

Day	Time	HUT
Monday-Friday	7-9 a.m.	26
Monday-Friday	9 a.m. - Noon	25
Monday-Friday	Noon - 4 p.m.	28
Monday-Friday	4 .-6 p.m.	41
Monday-Friday	6 - 8 p.m.	58
Monday-Friday	8 -11 p.m.	65
Monday-Friday	11 - 11:30 p.m.	45
Monday-Friday	11:30 p.m. - 1 a.m.	27
Sunday - Saturday	9 a.m. - Midnight	43
Sunday - Saturday	Sign on -Sign off	37

A prime time-only test, therefore, would ignore other times of day when viewing was significant.

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[24]House Report at 94.

[25]Arbitron Television Daypart Audience Estimates Summary (February, 1992).

- **THE NETWORK DEFINITIONS FROM EITHER §§73.661 (?) OR 73.3613 SHOULD BE USED FOR PURPOSES OF THE MUST CARRY RULES.**[26]

The Commission should avoid such definition "transplants." Neither of these rules deals with the concept of duplication in the eyes of the viewer. §73.661 is based on whether an entity can damage diversity via anticompetitive conduct in the program production and syndication marketplaces. It focuses purely on prime time because prime time programming remains the locus of most network ability and incentive to engage in anticompetitive conduct.

Similarly, §73.3613 is a reporting requirement, which has nothing to do with the level of program duplication among stations. In short, the purpose of §§73.661 and 73.3613 bear no relation to the matter at hand, which relates strictly to how much duplication would curtail the marginal value to the consumer of the potentially duplicative channel. Therefore, they should be discarded as wholly impertinent in this proceeding.

.....AND THE UGLY

- **DUPLICATION OF 25% IN PRIME TIME SHOULD BE CONSIDERED SUBSTANTIAL DUPLICATION.**

If two independent stations carried *Deep Space Nine*, a one-hour program, in the four hours of prime time, then they would be considered as substantially duplicative under this proposed definition, even if they showed that one hour of duplicative programming at different times (*e.g.*, 7 p.m. and 10 p.m.) and even if

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[26]Comments of the National Cable Television Association, MM Docket No. 92-259 (filed January 4, 1992) at 19 [hereinafter cited as "NCTA"]; Comments of Time Warner Entertainment Company, L.P., MM Docket No. 92-259 (filed January 4, 1992) at 21 [hereinafter cited as "TW"]; Comments of Adelphia Communications Corporation *et al.*, MM Docket No. 92-259 (filed January 4, 1992) at 14 [hereinafter cited as "ACC"].

none of the remainder of their programming in non-prime time was duplicative. This is a grade A, tripled-distilled, *bona fide* UGLY!

CARRIAGE OBLIGATIONS OF MULTIPLE ADI CABLE SYSTEMS

THE GOOD

- **A CABLE SYSTEM MAY BE CONSIDERED LOCATED IN MORE THAN ONE ADI.**

A primary reason for granting the Commission the authority to revise the market identification of a community arose from situations like the Washington-Baltimore metropolitan area. Baltimore and Washington are two distinct ADIs, although counties located between Washington and Baltimore harbor viewers who watch stations from both markets in significant amounts. If communities in each such county were constrained to identity with one market or the other, viewers might be deprived of stations they have watched routinely for years. If, however, a community could enjoy a dual market identity, then viewer habits could be maintained and stations could continue to count on cable carriage conterminous with their coverage of communities outside their ADIs.

Fully aware of this potential problem, Congress gave the Commission power to designate communities as identified with more than one market. The House Report is unequivocal:

> The FCC also may determine that certain communities are local to more than one television market, such as a community which is in one ADI, but is geographically close to television stations in another ADI and which also is served by those stations.[27]

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[27]House Report at 96.

Suggestions to the contrary, therefore, must be rejected out of hand.[28]

..... THE BAD

- **THE HEADEND LOCATION SHOULD ESTABLISH THE LOCATION OF THE SYSTEM.**

Now, this truly is a bad idea![29] The Commission hardly may stick its head in the sand and pretend cable systems remain a tower full of receive antennas at the center of the cable system. The age of simple community antenna systems lent enormous sway to the headend as the defining element of a cable system's location. No more. Satellite delivery, interconnects, CARS microwave facilities, and improved signal amplification technologies now have redefined the concept and utilization of headends. Use of multiple headends has forced adoption of the concept of a principal headend. Consequently, the location of "the headend" is now an even more arbitrary determinant of the location of a system.

Furthermore, some cable operators candidly admit the problems created by looking to the location of the headend.[30]

The attraction of using "the" headend, of course, to the remainder of the cable industry is that it confines a system to one market, which, as noted above, is flatly contrary to Congressional intent.

Therefore, INTV reiterates that dual-ADI systems be relieved of carriage obligations only via waiver in truly compelling circumstances.

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[28]TCI at 3.

[29]TCI at 4.

[30]Continental at 6.

.....AND THE UGLY

- **THE CABLE OPERATOR MAY SELECT THE ADI IN WHICH THE SYSTEM WOULD BE CONSIDERED LOCATED.**[31]

This opens the door wide to cable usurpation of prerogatives reserved to the Commission by Congress. If cable operator's discretion were worthy of confidence, Congress would not have had to step in in the first place. The Commission, therefore, must not abdicate and let cable operators' "discretion" fill the void.

THE §76.51 MARKET LIST

THE GOOD

- **THE MARKET LIST IN §76.51 SHOULD BE EXPANDED TO ALL MARKETS. AND UPDATED EVERY THREE YEARS.**

INTV's proposal is one of several urging "revitalization" of §76.51's market list.[32] Such an approach recognizes change, but provides for stability as well.[33] Moreover, it reflects Congressional intent.[34]Thus, it deserves serious consideration.

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[31]TW at 15; ACC at 8.

[32]NCTA at 14.

[33]The list, after all, is over 20 years out of date and fails to reflect many communities where stations have commenced operation since 1971.

[34]Conference Report at 39.

- **THE RANK ORDER OF MARKETS IN THE §76.51 MARKET LIST NEED NOT BE DISTURBED INSOFAR AS DISTANT SIGNAL QUOTAS REMAIN RELEVANT TO COPYRIGHT ROYALTY DETERMINATIONS.**

Cable operators have raised the concern that revisions to §76.51 insofar as the ranking of markets is involved would affect cable royalty rates.[35] INTV does not oppose freezing the market ranking at least for purposes of determining copyright liability.

- **CARRIAGE WHICH WOULD HAVE TO BE DISCONTINUED AS A RESULT OF MODIFICATION OF THE §76.51 MARKET LIST SHOULD BE GRANDFATHERED.**[36]

This proposal also has merit. First, it preserves viewing options which might otherwise be lost. Second, it is consistent with the Commission's policy of considering signals once shown to be significantly viewed as significantly viewed in perpetuity.

INTV does remind the Commission that special relief or waivers may be called for in certain cases where substantial changes in circumstances render such grandfathering unnecessary. However, as a general rule, revisions to §76.51 should not prompt discontinuance of carriage.

..... THE BAD

- **THE MARKET LIST IN §76.51 SHOULD BE FROZEN INDEFINITELY.**[37]

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[35]TCI at 19.

[36]TCI at 28.

[37]TW at 12.

Congress has dictated otherwise. Section 76.51 is to be updated.[38] Period.

.....AND THE UGLY

- **THE COPYRIGHT OFFICE'S SUGGESTING THAT IT MIGHT CHANGE ITS POLICY CONCERNING MODIFICATION OF THE §76.51 MARKET LIST.[39]**

If the primary purpose of updating §76.51 is for copyright related purposes and Congress has mandated that §76.51 be updated, then the Copyright Office ought stay in step with its parent body.

MODIFYING COMMUNITY MARKET IDENTIFICATION

THE GOOD

- **THE ESTABLISHED SPECIAL RELIEF PROCEDURES SHOULD BE USED TO ADJUDICATE CHANGES IN A COMMUNITY'S MARKET IDENTIFICATION.**

This proposal enjoys support from the broadcast and cable industries.[40] Therefore, it should be adopted.

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[38]Section 614(f) is explicit in this regard.

[39]Comments of the United States Copyright Office, MM Docket No. 92-259 (filed January 4, 1992) at 5 [hereinafter cited as "©"].

[40]*E.g.*, INTV at10, Continental at 11.

- **BROADCASTERS AND CABLE OPERATORS OUGHT TO BE ABLE TO SEEK SPECIAL RELIEF.**

  Ditto.[41]

- **HISTORICAL CARRIAGE PATTERNS SHOULD BE ACCORDED GREATEST WEIGHT IN EVALUATING A COMMUNITY'S MARKET IDENTIFICATION.**

  Ditto (almost).[42]

..... THE BAD

- **AN EXCEPTION TO THE MARKET (RATHER THAN STATION) ORIENTATION OF THE DETERMINATION SHOULD BE MADE FOR "FAR FLUNG" LOCAL STATIONS[43].**

This is unnecessary. Again, the signal strength and copyright fee reimbursement provisions will protect cable operators from undue burdens.[44] No special carve out need be made. It would only create another creative loophole for cable systems to use in seeking escape of their obligations under the Act.

- **IF THE STATION AND CABLE SYSTEM AGREE ON A MODIFICATION OF A COMMUNITY'S MARKET IDENTIFICATION, THEN THEY OUGHT BE PERMITTED TO IMPLEMENT THE CARRIAGE WHICH WOULD BE ENGENDERED BY THE RELIEF SOUGHT.[45]**

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[41]Ditto.(or is that "*Id.*" ?)

[42]*E.g.*, INTV at , NCTA at 15..

[43]TCI at 8.

[44]The case of WYVN, Martinsburg, cited by TCI, is not nearly as egregious as TCI portrays it. The station places a Grade B signal into many counties to the north and west of D.C. (*e.g.*, Montgomery, Frederick, Loudon, Fairfax). However, these counties are located more than 35 miles from Martinsburg and likely are not considered local for copyright purposes.

[45]ACC at 8.

As attractive as this may sound, it ignores the effect on other stations and possibly cable systems. The focus of the rule is markets, not stations *per se*. Other stations would be affected, both positively and negatively. Only if all affected stations and systems joined in a request should the Commission permit them to jump the gun.

- **THE COMMISSION SHOULD RELY ON VIEWABILITY CRITERIA, INCLUDING THE "SIGNIFICANT VIEWING" TEST AND/OR STATIONS' GRADE B CONTOURS.**[46]

Congress threw viewing standards out the window. They should not be permitted to sneak back in through the side door. As stated in the Senate Report:

> Finally, the Committee believes that this provision, by not including a minmum viewing standard, will help new stations and stations that target special audiences to obtain carriage, thus increasing the diversity of local programming available to viewers.[47]

Furthermore, viewability criteria are station rather than market oriented and run afoul of the specific Congressional directive that "this section is not intended to permit a cable system to discriminate among several stations licensed to the same community."[48]Finally, the signal strength test will insulate cable systems from any undue burdens of carrying less proximate signals. No redundant provision based on a community's market identification ought be incorporated into the new rules.

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[46]Continental at 7.

[47]Senate Report at 47.

[48]House Report at 98.

.....AND THE UGLY

- **NO CABLE SYSTEM SHOULD BE CONSIDERED IN THE MARKET OF A STATION LOCATED MORE THAN 50 MILES FROM THE CABLE SYSTEM.**[49]

Congress abandoned mileage as a factor and for good reason. As stated in the legislative history of Section 614:

> The Committee believes that ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition.[50]

The Commission must not redo what Congress has undone.

- **FACTORS WHICH ARE BASED ON THE CHARACTERISTICS OF OR EFFECTS ON A CABLE SYSTEM SHOULD BE EMPLOYED IN DETERMINING THE MARKET IDENTIFICATION OF A CABLE SYSTEM'S COMMUNITY.**[51]

Looking to how a cable system would be affected would distort the analysis intended by Congress. The whole point of the exercise is whether a community is part of a market. Therefore, Congress established criteria which "may be used to demonstrate that a community is part of a particular station's market." Whereas these criteria are not exclusive, they demonstrate the proper focal point of the analysis.

Furthermore, if cable systems might suffer special hardships as a result of a market identification change in their community, the waiver and special relief processes remain available to them. No general rule should embrace these factors,

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[49]Continental at 9.

[50]House Report at 97.

[51]Continental at 8.

which remain fundamentally irrelevant to whether a community is identified with a particular market.

THE SIGNAL STRENGTH REQUIREMENT

THE GOOD

- **AVAILABILITY OF A TRANSLATOR SIGNAL OF REQUISITE STRENGTH SHOULD SATISFY THE SIGNAL STRENGTH REQUIREMENT.**

If the signal of a full power television station is available to a cable system via a translator, then the stations should be deemed to have delivered a signal of requisite strength to the cable system. INTV recognizes that cable systems have no obligation to carry translator signals, but they do have an obligation to carry the primary station within its ADI if its signal is available at the requisite strength. Whether the signal is delivered from the the primary station's transmitter or from a more proximate translator makes no practical difference as long as the signal meets the signal strength test.

This concept should pose no problem for cable operators, many of which have advanced a similar idea.[52] As one group of cable operators has observed:

> A cable system should be permitted to carry a translator in lieu of the parent station to satisfy the signal quality or to satisfy the copyright indemnification provisions assuming that there is agreement between the parent station and the cable system.[53]

INTV, of course, urges that systems be required, not just permitted, to carry a signal if available at requisite strength from a translator. Indeed, this is just the sort of

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[52] *E.g.*, TW at 30; ACC at 21.

[53] ACC at 21.

practical solution to implementation problems that the Commission should readily embrace!

Finally, the significance of the Commission's rules implementing this section of the Act deserves emphasis. Many stations have achieved full coverage of their ADIs with translators. The Commission would ignore them only at risk of a gross failure to implement what Congress has intended, namely ADI-wide carriage.

..... THE BAD

- **THE BURDEN OF PROOF SHOULD BE ON STATIONS TO SHOW THAT THEIR SIGNAL IS AVAILABLE TO THE SYSTEM AT THE REQUISITE STRENGTH.**[54]

Placing the burden on stations turns the Act on its head. The lack of signal availability at the requisite strength is an *exception* to the rule. Once a station proves the rule, the burden should shift to the cable operator to prove the exception.

INTV is somewhat sanguine that cooperation between the engineering staff of stations and cable systems can resolve most problems. Neither stations nor systems gain from carriage of a lousy signal. Nonetheless, cases may arise where cable systems are simply seeking to evade their obligations by alleging lack of a strong enough signal. The burden, therefore, ought fall on them.

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[54]NCTA at 12.

.....AND THE UGLY

- **SIGNAL QUALITY TESTS (SUCH AS A TASO 2 THRESHOLD) SHOULD BE EMPLOYED TO DETERMINE IF A STATION PROVIDES A SIGNAL OF REQUISITE STRENGTH.**[55]

The Commission should keep it simple and not add another element to the test established in the Act. The Act is specific, clear, and workable in terms of a signal strength (*nee'* quality) requirement. Another element to the test would undo what Congress has done, complicate the process, and add to the Commission's burdens.

PAYMENT OF DISTANT COPYRIGHT FEES

THE GOOD

- **AVAILABILITY OF A LOCAL TRANSLATOR SIGNAL SHOULD CONSTITUTE A MEANS OF INDEMNIFYING A CABLE OPERATOR FOR DISTANT SIGNAL ROYALTIES.**

Again, this approach derives from comments of many cable operators.[56]INTV differs only in that it proposes that cable systems be *required* to rely on a translator signal if it is a valid means of eliminating distant signal royalties.[57] For a cable system to insist that a station reimburse essentially unnecessary royalties would be ludicrous and contrary to the spirit and intent of the Act.

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[55]TW at 28.

[56]TW at 30; ACC at 21.

[57]Translators enjoy 35-mile local zones under §111 of the Copyright Act. 17 U.S.C. §111(f).